defense UPDATE

The Iowa Defense Counsel Association Newsletter January, 1996 Vol. IX, No. 1

Tort Recovery For Emotional Stress

By Mark S. Brownlee, Fort Dodge, Iowa

This article discusses the recovery of damages for emotional distress. At the outset, the sometimes blurred distinction between intentional infliction of emotional distress as an independent tort theory of recovery and emotional distress as a species of tort damages should be noted.

I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Elements Of Recovery

An understanding of the tort of intentional infliction of emotional distress begins with a review of the pertinent parts of the Iowa Civil Jury Instructions which set forth and describe the elements of recovery:

2000.1 Emotional Distress – Intentional Infliction – Essentials For Recovery. [To entitle the plaintiff to recovery on the claim for the tortious infliction of severe emotional distress] the plaintiff must prove all of the following propositions:

1. Outrageous conduct by the defendant.
2. The defendant intentionally caused emotional distress or acted with reckless disregard of the probability of causing emotional distress.
3. The plaintiff suffered severe and extreme emotional distress.
4. The defendant's outrageous conduct was a proximate cause of the emotional distress.
5. The nature and extent of plaintiff's damage.

2000.2 Outrageous Conduct – Definition. The term "outrageous conduct" means conduct so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

Outrageous conduct does not extend to mere insults, indignities, threats, annoyances, petty oppressions, hurt feelings, bad manners, or other trivialities which a reasonable person could be expected to endure. All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are inconsiderate and unkind.

2000.4 Severe or Extreme Emotional Distress – Definition. The emotional distress must in fact exist, and it must be severe or extreme, but it need not reveal itself physically.

The term "severe or extreme" means substantial or enduring as distinguished from mild or brief.

The term "emotional distress" includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment and worry. It must be so substantial or enduring that no reasonable person could be expected to bear it.

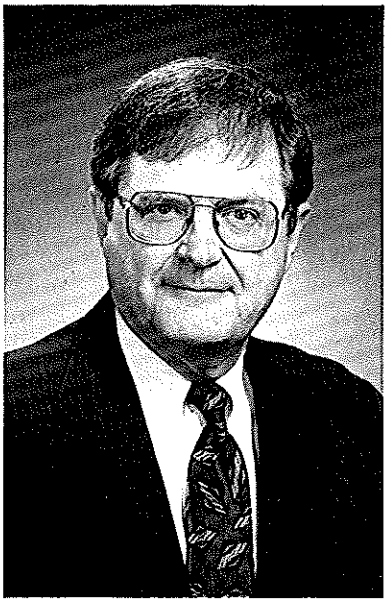
1. Outrageous conduct

Regarding the element of outrageous conduct, "It is for the court to determine in the first instance, as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous." *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193 (Iowa 1985) (termination of plant superintendent for alcoholism did not constitute outrageous conduct). Although different persons may react much differently in response to the same emotional stressors, this reflects the reasonable person standard contemplated in I.C.J.I. 2000.2 and I.C.J.I. 2000.4. In other words, outrageousness is not in the eyes (or mind) of the plaintiff. Notwithstanding the plaintiff's reaction to distressing conduct, the conduct must still cross a reasonableness threshold in the eyes of the court in consideration of all surrounding circumstances.

Other cases where the outrageousness of the defendant's conduct was the primary issue include *Vinson v. Linn-Mar Community School District,* 360 N.W.2d 110 (Iowa 1984) (ongoing intentional campaign of harassment by a supervisor, including accusation of falsifying time records, did not constitute outrageous conduct); *Meyer v. Nottger,* 241 N.W.2d 911 (Iowa 1976) (conduct of mortician in handling body of plaintiff's deceased father and in conducting burial services constituted outrageous conduct); *Roalson v. Chaney,* 334

Continued on page 6

MESSAGE FROM THE PRESIDENT



Chuck E. Miller
President

I am very happy and proud to have the opportunity to serve IDCA for the coming year. As I have learned at several regional and national DRI conferences, there are few defense organizations which can match the seminars and publications your organization sponsors. IDCA's success and high national reputation for excellence have been achieved without a professional paid staff. Our accomplishments result from efforts of individuals willing to get involved and donate their time to make IDCA a success. As the new year is upon us, let me urge those who have not had the opportunity to become involved, in our committee work, in submitting an article for the *Defense Update*, or perhaps as a speaker, to take advantage of this invitation to do so. IDCA features the following committees: Amicus Curiae, Client Relations, Commercial Litigation, Jury Instructions, Law School Programs, Legislative, Newsletter, Products Liability, Rules, and Tort and Insurance Law. If you are interested in a committee assignment, please let me know. Speaking at our annual meeting is a good opportunity to assist. President-Elect Bob Engberg is assembling the program and would be delighted to talk with you. It is your organization – get involved!

The reorganization of the Defense Research Institute is now essentially complete. The first annual membership meeting will be held in Chicago October 9 through 13, 1996. The program will contain a significant amount of CLE. We are advised the registration will be on the order of $600 and the meeting will be headquartered at the Fairmont Hotel. DRI advises that this will be the first opportunity for "grass roots membership" to participate in the nomination of officers.

The Association's legislative agenda again includes an attempt to repeal the decision in *Schwennen v. Abell*. We are also working towards a lowering of the interest rate on money judgments from 10% to a floating rate similar to current federal practice. As many are aware, in 1995 the Supreme Court in the case of *Brant v. Bockholt* held that awards for future non-economic damages such as pain and suffering and emotional distress need not be reduced to present value. We will be introducing legislation to redress that change in Iowa tort law. The session will probably be very interesting in view of the fact that 1996 is an election year.

The Board of Directors join with me in sending you best wishes for 1996.

LEGISLATIVE COMMITTEE REPORT

By Mark L. Tripp, Des Moines, Iowa

The Legislative Committee of the Iowa Defense Counsel Association with the assistance of our lobbyist, Bob Kraemer, monitors legislation which may have an impact on our members. In addition to monitoring legislation sponsored by other groups, IDCA also sponsors legislation. The legislative agenda of IDCA is reviewed not only by IDCA's Legislative Committee but is also reviewed and approved by the Board of Directors for IDCA.

We currently have three legislative agenda items which have been assigned either House or Senate File numbers. Those agenda items are as follows:

1. **House File 345 – Iowa Code – 535.3 – Interest on Judgments.** This bill lowers the interest rate on money judgments from 10% to a floating rate. Under this bill interest on judgments would be treated the same as interest on judgments under Iowa Code § 668.

2. **House File 250 – Senate File SSB 263 – *Schwennen v. Abell.*** This bill provides that any percent of fault assigned to a person whose death or injury gave rise to a consortium claim shall apply to reduce or bar a judgment for loss of consortium. This bill would modify the Iowa Supreme Court's holding in *Schwennen v. Abell.*

3. **House File 300 – Joint and Several Liability.** Iowa currently operates under a modified form of joint and several liability. This bill totally eliminates joint and several liability in comparative fault actions.

In addition to the above legislative items which have already been assigned either a House or Senate File number, the Defense Counsel will be sponsoring two additional legislative items. First, we will introduce legislation to modify the Iowa Supreme Court holding in *Brant v. Bockholt.* In *Brant,* the Iowa Supreme Court held that awards for future non-economic damages such as pain and suffering and emotional distress need not be reduced to present value. The holding in *Brant* constitutes a change in Iowa tort law. Pursuant to Iowa Uniform Jury Instruction 200.35 all future damages are to be reduced to present value.

The second addition to the legislative agenda relates to a defendant's access to medical information on a plaintiff. At the present time the doctor/patient privileges is waived on a limited basis by the filing of a civil action. The waiver provisions applicable to civil claims are contained in Iowa Code § 622.10. The waiver provisions of Iowa Code § 622.10 are limited. The Defense Counsel is sponsoring legislation similar to that recently adopted by the Illinois legislature which allows defense counsel broader access to medical information regarding the plaintiff. The legislation would essentially allow the defense in civil litigation the same access to medical information which defense lawyers have in workers' compensation actions.

The success of our legislative efforts is dependent upon our grass roots contacts with House and Senate members. Almost all tort reform type legislation passes through the judiciary committees of the House and Senate. The following individuals head the judiciary committees in the House and Senate:

HOUSE:
Charles Hurley, Chairman
319-425-3397
Jeffrey M. Lamberti, Vice Chair
515-243-7611
Phillip E. Brammer, Ranking Member
319-393-6137

SENATE:
Randal Giannetto, Chairman
515-752-4283
Tom Vilsack, Vice Chair
319-528-6176
Andy McKean, Ranking Member
319-462-4485

You can contact the above individuals at any time to express your support for our legislative efforts. If there are other legislative agenda items you would like the legislative committee to consider, please feel free to contact me with your suggestions.□

A Day in Your Life...

On an average day In the US:

- 124 new books are published
- $1.6 billion is spent in shopping malls
- 3 government officials are indicted
- 9 corporate mergers are consummated
- 965,000 Cokes are consumed for breakfast
- 101,369,863 hours are spent waiting in line
- 1,658 people visit Graceland
- and four people call Graceland and ask to speak to Elvis

--Tom Heymann, *On an Average Day*

AMICUS CURIAE COMMITTEE MAINTAINS PERFECT RECORD

By Michael W. Ellwanger, Sioux City, Iowa

In April, 1995, the Iowa Defense Counsel filed its third Amicus Curiae brief. The brief was filed with the Iowa Industrial Commissioner in the case of *Mead v. The Dialo Corporation* (No. 1003299). Prior to the filing of the brief, Industrial Commissioner Byron K. Orton issued a "Notice of Request for Brief of an Amicus Curiae." This Notice was issued to a number of different individuals and organizations. The Industrial Commissioner proposed that the briefs address the following issues:

1. Is the evaluation of a scheduled disability limited to the loss of physiological capacity of the body part?

2. If so, is the evidentiary standard to be applied limited to a rating of impairment established by medical evidence properly using *The Guides to the Evaluation of Permanent Impairment* published by the American Medical Association?

The Iowa Defense Counsel accepted the challenge, and a brief was prepared by Thomas J. Logan of the Hopkins & Huebner firm, Des Moines, Iowa.

In its brief, the Defense Counsel took the position that the evaluation of scheduled disability was limited to a consideration of the functional capacity of the body part, pursuant to Chapter 85.35(2). The issue had been revisited in a series of recent decisions of the Iowa Supreme Court. *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404 (Iowa 1994); *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808 (Iowa 1994); and *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12 (Iowa 1993). *See also Second Injury Fund v. Bergeson*, 526 N.W.2d 543 (Iowa 1995).

On the second issue, the Defense Counsel took the position that the Industrial Commissioner was required to base his determination of functional disability upon medical evidence using *The Guides to the Evaluation of Permanent Impairment*. Rule 343-2.4(85) of the Rules of the Division of Industrial Services, provides that the *Guides* are adopted "as a guide for determining personal permanent partial disability . . .." The Administrative Procedure Act requires that findings of hearing officers be based upon "evidence." Iowa Code §17A.14(1-4). The expertise of the agency may be used to evaluate evidence, but itself cannot be evidence. While noting that the Supreme Court has expressed some frustration with scheduled disabilities, *see Gilleland*, 524 N.W.2d at 409, the Industrial Commissioner was statutorily required to base its decisions in scheduled disability cases to the actual functional impairment, and that this determination must be made upon medical evidence.

On August 24, 1995, the Industrial Commissioner issued its decision. The particular facts of the case were that the claimant had a previous knee injury resulting in a 22% permanent impairment rating. She then experienced another injury. Her work restrictions were somewhat different, but there was no medical testimony that her impairment rating, based upon the *Guides* was any different. The court held that the claimant was not entitled to any additional benefits. In confronting the above issues, the court held:

1. A partial loss of a scheduled member is determined by the "physiological loss or functional loss of the body part."

2. Pursuant to Rule 343 I.A.C. 2.4, the "best evidence for determination of the extent of a scheduled member disability is medical evidence giving the rating of impairment determined by properly using the AMA guides."

3. Medical opinion based on other opinions or guides could also be presented and considered.

4. Non-medical opinion could buttress but could not supplant the medical evidence.

Apparently the Deputy Industrial Commissioner in this case wanted to use his own expertise, and possibly lay testimony, to adjust the 22% impairment rating. While the Industrial Commissioner indicated that there may be "rare instances" when the AMA guides were not the best evidence, e.g., severe permanent restrictions and a low impairment rating, as a general rule the agency could not ignore the impairment rating and make adjustments to such rating.

There does appear to be increasing pressure on the agency or the legislature to make some change in the law of scheduled members. However, in light of this decision, it does appear that the agency is going to continue to adhere to the AMA guidelines, and that any change will have to come from the legislature.□

TURNING THE TABLES

By John D. Stonebraker, Davenport, Iowa

Do you cringe a little during jury selection when plaintiff's counsel asks The Insurance Question? Do you drop Black's Law Dictionary on the floor to distract the panel from hearing, "Are you or any member of your immediate family an employee, director, officer or stockholder of Desdemona Casualty Insurance Company?"[1]

You know, of course, that plaintiff's attorney would be thunderstruck if a venireman ever responded affirmatively to such a question. You also know that your small hope of jury deliberations unencumbered by the issue of insurance has gone aglimmering. "No matter," you say. "Everybody knows or suspects that there is insurance standing behind my client anyway. And perhaps the jury won't be too generous because they don't know how much insurance he has."

Maybe you can turn the tables. Iowa Code chapter 668.14(11) provides:

> In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care, except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or members of the claimant's immediate family.

So, why not ask if any member of the panel is connected directly or by familial relationship with plaintiff's health and accident carrier? If the plaintiff has been compensated by his health insurance provider, and if his policy has a subrogation clause (and most do) you have a legitimate interest in this information. In fact, your interest is even more defensible than the plaintiff's interest in your client's liability insurance because, thanks to the legislature, you can bring in direct evidence of health care coverage. A right of subrogation might create a financial interest in the outcome of the litigation for a stockholder of The Travelers, for example, if he or she learns that The Travelers has provided plaintiff with first party benefits. Moreover, the Iowa Supreme Court has held that subrogation claims for medical assistance benefits are subject to reduction for the insured's comparative fault, *Bales v. Warren County, et al.*, 478 N.W.2d 398 (Iowa 1991). Thus, the issue of health and accident insurance coverage could also be affected by the existence and extent of plaintiff's comparative negligence.

The overall usefulness of Chapter 668.14 is subject to debate, of course. In a case of weak liability and strong damages, the realization that plaintiff's bills have been paid may avoid a compromise verdict motivated by sympathy for an injured person facing apparently unmet medical expenses. In such cases a voir dire question introducing the fact of a collateral payment at the earliest possible moment should work to the advantage of the defense.

[1] Allowing the name of the defendant's liability carrier has been held not to be an abuse of discretion, *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 377 (Iowa 1972).

AMICUS CURIAE COMMITTEE TAKES ON APPEAL

The Amicus Curiae Committee has recently decided to become involved in a new case. In *McCoy v. Merritt Construction*, the plaintiff's psychologist (Dr. Thomas Sannito) expressed the opinion that the plaintiff was 50-60% psychologically disabled. The psychologist had performed a number of psychological tests. However, he refused to produce the raw data and test scores citing §228.9. Defense counsel felt that they were entitled to the material pursuant to Rule 125(B) of the Iowa Rules of Civil Procedure. The trial court sided with the psychologist, and the defendants have applied for interlocutory appeal. Because of the important issues involved, the Defense Counsel determined to file an amicus curiae brief, with the hope that the Supreme Court would ultimately rule that the test scores and raw data would be discoverable.

TORT RECOVERY FOR EMOTIONAL STRESS

Continued from page 1

N.W.2d 754 (Iowa 1983) (defendant's marriage proposal to plaintiff's wife did not constitute outrageous conduct); *Ahrens v. Ahrens*, 386 N.W.2d 536 (Iowa App. 1986) (defendant's conduct in causing former wife to be jailed as part of contempt proceeding arising from child custody dispute constituted outrageous conduct); *Mills v. Guthrie County Rural Elect.*, 454 N.W.2d 846 (Iowa 1990) (defendant's conduct in connection with adjustment of fire loss did not constitute outrageous conduct).

In many other cases referred to in this article, the outrageousness of the defendant's conduct was essentially conceded. The fighting issue involved another element of recovery, i.e., whether or not the conduct was intentional or reckless or the distress sufficiently severe or extreme.

2. Intentional or reckless conduct

The second element of recovery reflects the inaccuracy of referring to this theory as "intentional" infliction of emotional distress. As noted in *Northrup v. Farmland Industries, Inc.*, 372 N.W.2d 193, 197 (Iowa 1985), it is more accurate to refer to this injury as "tortious" infliction of emotional distress:

> "Although our cases have referred to this claim as an 'intentional infliction of emotional distress,' neither the Restatement nor our cases actually require proof of an intentional act; a 'reckless disregard of the probability of causing' emotional distress is enough."

Based upon a largely definitional analysis, the Iowa Supreme Court determined in *M.H. By And Through Callahan v. State*, 385 N.W.2d 533, 539 (Iowa 1986), that " . . . the element of 'reckless disregard of the probability of causing emotional distress' may be established without showing that such act is either willful or wanton." Stated differently, reckless conduct may be outrageous without being willful or wanton.

3. Severe or extreme emotional distress

The third element requires that the emotional distress be severe or extreme. It is worth noting that as with the outrageous conduct element, the severity of the claimed distress is measured against a reasonable person standard. It is not enough that a person found an event emotionally distressing, even severely so. The distress "must be so substantial or enduring that no reasonable person could be expected to endure it." *See* I.C.J.I. 2000.4.

Several Iowa Supreme Court cases have articulated and refined this requirement. In *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981), the Court ruled that, "The distress does not have to manifest itself physically" to be compensable. The Court further noted that, "In some cases, the outrageousness of the defendant's conduct may be enough evidence that the distress is severe." *Id.*

In *Vaughn v. Ag. Processing, Inc.*, 459 N.W.2d 627 (Iowa 1990), the plaintiff sued his employer under several theories, including intentional infliction of emotion distress, in connection with alleged mistreatment at work. The plaintiff had repeatedly been the object of anti-Catholic remarks by his supervisor. Without deciding whether or not the remarks were sufficiently outrageous to be actionable, the Iowa Supreme Court held the evidence that the plaintiff "had been upset, grouchy, nervous, and that his sex life had deteriorated" was insufficient to support a finding of severe emotional distress. 459 N.W.2d at 636. "Plaintiff must prove more than the fact that he felt bad for a period of time." *Id.* Similarly, in *Poulsen*, the Court ruled that the evidence that the plaintiff was "very, very down" and "felt that he lost everything" for "at least a month or two" was insufficient proof of severe emotional distress. 300 N.W.2d at 297.

In *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396 (Iowa 1991), a physician reportedly suggested that the plaintiff "unplug" his wife because she would be dead and he would be broke in three months anyway, calling the plaintiff a "fool" for not doing so. The plaintiff described the confrontation as "the worst thing" that ever happened to him. The Iowa Supreme Court found the evidence insufficient to prove severe distress. The following excerpt from page 404 of the opinion well illustrates the Court's approach to cases involving emotional upset, as distinguished from severe emotional distress:

> "It is regrettable, but insufficient from a legal point of view, that Albert regarded the confrontation as "the worst thing" that ever happened to him. Even when viewed in the most favorable light, Albert's evidence of feeling upset and confused by the

Continued on page 7

TORT RECOVERY FOR EMOTIONAL STRESS

Continued from page 6

heated exchange falls far short of proof necessary to sustain a prima facie case. Beyond the evidence sketched above, the record contains no proof that Albert sustained any severe emotional distress as a result of the doctor's harsh words. As we have previously stated, '[t]he law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.' *Bethards v. Shivvers, Inc.*, 355 N.W.2d 39, 44 (Iowa 1984) (quoting Restatement (Second) of Torts §46, comment j (1965))."

In *Millington v. Kuba*, 532 N.W.2d 787 (Iowa 1995), the plaintiffs sought damages for emotional distress allegedly caused by a funeral home's wrongful cremation of their father's body. They pleaded both negligent (see later discussion) and intentional infliction of emotional distress. The Iowa Supreme Court affirmed the summary judgment entered for the defendant, finding the evidence insufficient to establish the requisite severity of the claimed emotional distress. The following passage at page 794 describes the record evidence of distress:

"The record shows that the emotional distress of plaintiff Maryrose consisted of head-aches, insomnia, and loss of appetite. She was not treated by a physician or any other medical practitioner for the symptoms and has taken no medications. Also, despite her loss of appetite, she has not suffered any weight loss.

Thomas, Jr.'s emotional distress was similarly insufficient. He initially had some fits of rage but his last such outburst was in November 1989. Like his sister, he suffered no physical difficulties and did not seek any medical attention as a result of the alleged wrongful cremation of his father."

For cases where the Iowa Supreme Court has found the evidence sufficient to support a finding of severe emotional distress, *see Meyer v. Nottger,* 241 N.W.2d 911 (Iowa 1976) (plaintiff was nauseous, had difficulty breathing, and suffered acute myocardio ichemia); *Northrup v. Miles Homes, Inc.,* 204 N.W.2d 28 (Iowa 1945) (plaintiff cried, lost weight, suffered abdominal cramps); *Blakeley v. Shortal's Estate,* 20 N.W.2d 28 (Iowa 1945) (plaintiff had difficulty sleeping, was nervous, restless, and did not return to scene of tort for some time).

B. Arising From Domestic Matters

It is interesting to note that claims for intentional infliction of emotional distress are recognized in the context of domestic conflicts. The theory was found potentially applicable in *Ahrens v. Ahrens,* 386 N.W.2d 536 (Iowa App. 1986), wherein the plaintiff sued her former husband after he allegedly utilized a false affidavit to cause her to be jailed for contempt in a child custody dispute. In *Van Meter v. Van Meter,* 328 N.W.2d 497 (Iowa 1983), the plaintiff sued the defendant under a theory of intentional infliction of emotional distress after the defendant allegedly seduced the plaintiff's former husband. The Iowa Supreme Court affirmed the trial court's refusal to dismiss the claim, distinguishing it from the abrogated tort of alienation of affections. *See, also, Roalson v. Chaney,* 334 N.W.2d 754 (Iowa 1983), which recognized the potential applicability of the theory of intentional infliction of emotional distress in a domestic context, but found the conduct (defendant proposed to plaintiff's wife while she was married to plaintiff) not sufficiently outrageous.

C. Client v. Attorney

In *Kunan v. Pillers, Pillers & Pillers, P.C.,* 404 N.W.2d 573 (Iowa App. 1987), in conjunction with a legal malpractice action, the plaintiff alleged his former attorney's inept handling of his case constituted intentional inflection of emotional distress. The Iowa Court of Appeals found insufficient evidence of intentional or reckless behavior on the part of the attorney, but refused to exempt attorneys from any such claims by clients:

"We believe that lawyers may not be exempt from the tort of the intentional infliction of severe emotional distress. If a lawyer desires to inflict severe emotional distress and where the lawyer knows such distress is certain, or substantially certain to result from his conduct or where a lawyer acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow, then the lawyer might be held liable for his acts regardless of whether the client would have prevailed in the underlying lawsuit."

404 N.W.2d at 577. It should be noted from the preceding excerpt that a client's recovery against an attorney for intentional infliction of emotional distress is not contingent upon successful prosecution of

Continued on page 8

TORT RECOVERY FOR EMOTIONAL STRESS

Continued from page 7

a companion legal malpractice claim.

D. No Claim For Negligent Infliction Of Emotional Distress

Iowa law does not recognize the independent tort theory of negligent infliction of emotional distress adopted in section 313 of the Restatement (Second) of Torts. *See Doe v. Cherwitz,* 518 N.W.2d 362 (Iowa 1994); *Cutler v. Klass, Whicher & Mishne,* 473 N.W.2d 178 (Iowa 1991); *Kunan v. Pillers, Pillers & Pillers,* 404 N.W.2d 573 (Iowa App. 1987); *Wambsgans v. Price,* 274 N.W.2d 362 (Iowa 1979). (But see later discussion of *Millington v. Kuba,* 532 N.W.2d 787 (Iowa 1995)). However, several cases discussed hereafter which allow recovery for emotional distress without accompanying physical injury effectually recognize the tort of negligent infliction of emotional distress under certain prescribed circumstances.

II. EMOTIONAL DISTRESS AS A SPECIES OF TORT DAMAGES

Emotional distress damages are recoverable in the context of a variety of claims and factual settings. Iowa Civil Jury Instructions 200.12-200.13 provide as follows regarding such recoveries in tort actions:

200.12 Physical And Mental Pain And Suffering – Past.

Physical and mental pain and suffering from the date of injury to the present time.

Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.

200.13 Physical And Mental Pain And Suffering – Future. The present value of future physical and mental pain and suffering.

The distress need not be severe to be compensable, *Nible v. Parr Mfg., Inc.,* 445 N.W.2d 351, 356-357 (Iowa 1989), but the general rule is that " . . . absent intentional conduct by a defendant, *or some physical injury to the plaintiff,* no recovery may be had for emotional distress." *Mills v. Guthrie County Rural Elect.,* 454 N.W.2d 846, 852 (Iowa 1990). There are exceptions to the requirement of accompanying physical injury:

A. Bystander Claims

In *Barnhill v. Davis,* 300 N.W.2d 104 (Iowa 1984), the Iowa Supreme Court recognized the right of a bystander to recover for emotional distress caused by witnessing serious injury or death on the part of a close relative as a result of the negligence of another. The elements of such bystander's claim are that:

1. The bystander was located near the scene of the accident.
2. The emotional distress resulted from a direct emotional impact for the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
3. The bystander and the victim were husband and wife or related within the same degree of consanguinity or affinity.
4. A reasonable person in the position of the bystander would believe, and the bystander did believe, that the direct victim of the accident would be seriously injured or killed.
5. The emotional distress to the bystander must be serious.

300 N.W.2d at 108. *See, also, Obereuter v. Orion Industries, Inc.,* 342 N.W.2d 492 (Iowa 1984), wherein the Iowa Supreme Court reaffirmed the *Barnhill* elements, including the requirement that the plaintiff actually witness the incident.

B. Special Relationship

Another exception to the requirement of accompanying physical injury is recognized "where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm." *Oswald v. LeGrand,* 453 N.W.2d 634, 639 (Iowa 1990). This exception has been found to apply to "the negligent performance of contractual services that carry with them deeply emotional responses in the event of breach as, for example, in the transmission and delivery of telegrams announcing the death of a close relative, *Mentzer v. Western Union Tel. Co.,* 93 Iowa 752, 768-71, 62 N.W. 1, 5-6 (1895), and services incident to a funeral and burial. *Meyer v. Nottger,* 241 N.W.2d 911, 920 (Iowa 1976)." *Oswald v. LeGrand,* 453 N.W.2d 634 (Iowa 1990).

This exception was found applicable to the delivery of medical services in *Oswald,* where the plaintiffs (parents) alleged the attitude exhibited by the defendant (obstetrician) and others was so insensitive that it caused them severe emotional distress. (See the opinion for the shocking details.) The Court

Continued on page 9

TORT RECOVERY FOR EMOTIONAL STRESS

Continued from page 8

by the defendant (obstetrician) and others was so insensitive that it caused them severe emotional distress. (See the opinion for the shocking details.) The Court observed that "the birth of a child involves a matter of life and death evoking such mental concern and solicitude that the breach of a contract incident thereto will inevitably result in mental anguish, pain and suffering." 453 N.W.2d at 639. The following passage at 453 N.W.2d at 640 indicates how narrow this exception is:

> "We in no way suggest that a professional person must ordinarily answer in tort for rudeness, even in a professional relationship. In order for liability to attach there must appear a combination of the two factors existing here: extremely rude behavior or crass insensitivity coupled with an unusual vulnerability on the part of the person receiving professional services."

It takes little imagination to foresee this exception being alleged against attorneys dealing with very sensitive matters (child custody?) in light of *Kunan v. Pillers, Pillers & Pillers, Inc.*, 404 N.W.2d 573 (Iowa 1987), which declined to exempt attorneys from clients' claims for intentional infliction of emotional distress based upon their handling of legal matters. One interesting aspect of *Oswald* is the implication that the unprofessional conduct, as distinguished from "therapeutic and diagnostic measures" of the doctor, may constitute professional negligence for which recovery for emotional distress may be obtained. 453 N.W.2d at 639. In that regard, it appears that medical providers may be liable for emotional distress damages for "unprofessional conduct" even without committing traditional medical malpractice. The same approach may well be applied to attorneys handling extremely sensitive legal matters in a rude or crass way, whether or not traditional legal malpractice is committed.

C. *Millington v. Kuba* – Negligent Infliction Of Emotion Distress As Tort Theory?

As previously noted, Iowa has expressly chosen not to recognize negligent infliction of emotional distress as an independent theory of recovery as adopted in section 313 of the Restatement (Second) of Torts. *See Doe v. Cherwitz*, 518 N.W.2d 362 (Iowa 1994). However, as previously discussed, Iowa law allows recovery for emotional distress in negligence cases, sometimes without accompanying physical injury. The recent case of *Millington v. Kuba*, 532 N.W.2d 787 (Iowa 1995) (wrongful cremation) seemingly elevates the limited recoverability of damages for emotional distress caused by negligence to an independent theory of recovery not previously expressly recognized by the Iowa Supreme Court. As a practical matter, the distinction may be academic, but it is notable nonetheless.

As previously discussed, *Millington* rejected the plaintiffs' intentional infliction of emotional claim due to insufficient evidence of severe or extreme distress as a result of the alleged wrongful cremation of their father's body. In rejecting the negligent infliction claim, the Court forged a very limited rule from prior cases which carved out exceptions to the usual requirement of accompanying physical injury in negligence cases. Citing *Barnhill* and *Oswald*, the Court ruled that recovery for negligent infliction of emotional distress (without accompanying physical injury) requires the existence of a highly emotional relationship, a contract between the parties and that the plaintiff personally experienced or observed the offensive conduct by the defendant.

D. Intentional Or Unlawful Acts

With torts involving willful or unlawful conduct, rather than negligence, recovery for emotional distress without accompanying physical injury has been allowed in a variety of situations. *See, e.g., Kraft v. City of Bettendorf*, 359 N.W.2d 466, 471 (Iowa 1984) (false arrest); *Blakely v. Estate of Shortal*, 236 Iowa 787, 791-93, 20 N.W.2d 28, 31 (1945) (act of suicide in plaintiff's kitchen); *Holdorf v. Holdorf*, 185 Iowa 838, 842, 169 N.W. 737, 738-39 (1919) (willful assault); *Johnson v. Hahn*, 168 Iowa 147, 149, 150 N.W. 6 (1914) (repeated solicitation to commit adultery); *Watson v. Dilts*, 116 Iowa 249, 252, 89 N.W. 1068, 1069 (1902) (encounter with a nighttime trespasser in the home).

E. Tortious Interference With Contract

In *Peterson v. First National Bank of Iowa*, 392 N.W.2d 158, 167 (Iowa App. 1986), the Iowa Court of Appeals allowed emotional distress damages arising out of a tort of interference with contract. *See* Restatement (Second) of Torts, §774(1)(c) (1977).

Continued on page 10

TORT RECOVERY FOR EMOTIONAL STRESS

Continued from page 9

F. Wrongful Discharge

In *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351 (Iowa 1989), the Iowa Supreme Court held that emotional distress damages are recoverable for wrongful discharge, reasoning that, "A wrongful or retaliatory discharge in violation of public policy is an intentional wrong committed by the employer against an employee who chose to exercise some substantial right . . . We believe that public policy also requires us to allow a wrongfully discharged employee a remedy for his or her complete injury." 445 N.W.2d at 355. The emotional distress need not be severe to be compensable. 445 N.W.2d at 357.

G. Wrongful Death/Dram Shop

Finally, it should be noted that feelings of grief, mental anguish, remorse and humiliation suffered as a result of a wrongful death are not compensable under §613.15 (wrongful death statute) or §123.92 (dram shop statute). *Haafke v. Mitchell,* 347 N.W.2d 381 (Iowa 1984). This relates to the fact that such actions are purely statutory with recovery limited to the elements prescribed by the statutes.

III. CONCLUSION

The recovery of damages for emotional distress continues to evolve as the appellate courts review cases presenting unique claims or facts. The Iowa Supreme Court seems to be somewhat reluctantly expanding the field of available claims by creating additional exceptions to traditional rules which serve to restrict or limit recovery for emotional distress. It remains to be seen how far the expansion will extend.□

OUR GREATEST ASSET

The following article is reprinted with permission of IDCA member, Jack Gross, Director of Claims Administration for Farm Bureau Mutual Insurance Company,West Des Moines, Iowa.

These are exciting times we live in. Every year a new generation of smaller, more powerful microprocessors and software becomes available, enabling one person to accomplish increasingly amazing things. Technology is becoming so advanced, and is moving forward so quickly, that it tends to absorb our attention as we struggle to keep up.

At Farm Bureau, we are reaping the benefits of much of that miraculous technology. There is one stand-alone system, however, that is totally unique and noteworthy, but sometimes fails to get the publicity it deserves. We hope you are as impressed by its astounding features as we are!

Not only can this unit process information at incredible speeds, it can actually see! It has one hundred million receptors in its visual structure that allow it to enjoy the magic of a snowflake, a sunset, or a friendly smile. These same orbital receptors can then convert that input into a communicative nonverbal language to express an emotional reaction. They will signal to the world the unit's amazement, amusement, sorrow, joy or caring.

In close proximity to the visual center are two auditory processors containlng forty-eight thousand fibers that vibrate to the sounds of laughter, wind in the trees, birds singing and the words "I love you."

Just beneath the auditory area is the equivalent of a sound card, but much more sophisticated. The sounds that it emits are controlled by both the central processing unit and a little understood adjunct referred to as a "soul." These two areas somehow work in harmony to produce sound vibrations that can calm the angry, uplift the depressed, encourage the quitter, praise the worthy, teach the ignorant, and say "I love you."

It is not only mobile, it is ambulatory! It has five hundred muscles, two hundred bones, and seven miles of nerve fibre, all synchronized to do the bidding of its CPU. It can stretch, run, dance and work, all of which seem to make the unit function more efficiently. It can also hug a child, intuitively knowing how to convey life sustaining messages of love, caring and concern.

Maintenance is minimal, since it virtually sustains itself under normal conditions. It has a self-contained pump that automatically pulsates at the rate of thirty-six million beats each year, without being plugged in or requiring batteries. This pump, about the size of a fist, somehow

Continued on page 11

OUR GREATEST ASSET

Continued from page 10

pumps a rich mixture of fluids through more than sixty thousand miles of tubing called veins, arteries, and capillaries. Six hundred thousand gallons a year are circulated through this small pump, and it doesn't even have a switch!

Its console is self-replenishing. While in time all metal cabinets will tarnish and corrode, this unit constantly replaces old and damaged cells with new ones, requiring only soap and water for cleaning. Oxygen that is required for maintenance is absorbed through six hundred million pockets of folded flesh, which also remove gaseous waste and toxins.

The five quarts of fluid that are circulated through the pump contain twenty-two million cells, and within each cell are millions of molecules, and within each molecule is an atom oscillating at more than ten million times each second. Each second, two million of the cells die, to be replaced in a resurrection that has been going on for years, ever since its creation.

Its data processing center is the most complex structure in the world, and no one thoroughly understands its intricacies. Within its three pounds are thirteen billion nerve cells, nearly three times as many cells as there are people on this planet. To file away every perception, every sound, every taste, every smell and every emotion it has experienced since its creation, there are more than one thousand million billion protein molecules implanted in the cells. Helping this information center control the rest of the unit are four million pain-sensitive structures, five hundred thousand touch detectors, and more than two hundred thousand temperature detectors dispersed throughout the console for self-regulation and protection.

It has enough atomic energy to destroy any of the world's great cities, and to rebuild it. It operates most of the time at only a small fraction of its capacity, however. Ironically, one of its most unique properties is that the more it is used, the stronger and more intelligent it becomes. It needs to be constantly challenged to reach optimum performance levels. Throughout its working life, it adapts to its changing environment by reprogramming itself with a modern data base. This feature makes it immune to the ravages of obsolescence that plague most assets.

It is totally unique — one of a kind. Even though twenty billion units of the same brand preceded it, none was like this one. The odds against its creation were enormous. From the raw components that went into its creation, three hundred thousand billion units, each different from the other, could have been created, but only one made the final production stage. Since it has been in production, the range of experience and knowledge that has become a part of its data base is infinite.

It is not an asset in normal accounting terms. It does not show up on our balance sheet as an owned asset that can be depreciated. It is far too rare and valuable for ownership. (That was tried during dark periods of our history and found to be abjectly and patently wrong.) At best, we merely lease a portion of its time, talent and capability.

Without it, however, our other resources are useless and meaningless. We depend on it for our success, we respect it for its unique abilities and adaptability, and we very much like doing business with it.

Actually, we are fortunate enough to have about 150 of these resources in our claim department, all working together as a team to achieve our objectives. Each of you is totally responsible for one of these rare and precious assets. Please handle it with extreme care, making sure that it gets the proper nourishment, rest and stimulation it needs to extend its life for as long as possible. Increase its value by constantly adding to its insurance data bank.

There will never be another one like the one that you are charged with maintaining and improving. Individually and collectively, we are very proud of these most special of all resources, and have grown fond of having all of them around. Yours is nothing short of miraculous. Guard it as if your life depends on it!

(Statistical data excerpted from Og Mandino's book "The Greatest Miracle In the World."

FROM THE EDITORS

After eight years, the plague is almost over. We refer to the avalanche of first party bad faith cases which appeared subsequent to the Supreme Court's recognition of the tort in *Dolan v. AID Ins. Co.* After that decision in 1988, it seemed that every denied insurance claim, no matter how meritorious the denial, resulted in a claim of bad faith. Thankfully, the Court in recent years has emphasized the "fairly debatable" standard and has made it quite clear that if a jury question exists as to coverage, then there is no bad faith as a matter of law. We shudder to think how much time, both of defense counsel and the judiciary, was wasted on frivolous bad faith claims before this pronouncement became definitely established in *Wetherbee v. Economy Fire & Cas. Co.* We hope that the Supreme Court will resist the temptation to relax these stringent requirements, since such a move will do little to serve the public and will no doubt result in an additional spate of frivolous claims. Additionally, with respect to those few remaining plaintiff attorneys who feel that every insurance denial deserves a bad faith suit, we urge the Supreme Court to follow through on its recent suggestion that such suits should be controlled through the use of Rule 80(a) sanctions. *Johnson v. Farm Bureau Mut. Ins. Co.* Maybe then we can close the book on the era of frivolous bad faith claims.

James A. Pugh
5400 University Avenue
West Des Moines, Iowa 50266